FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1984

CHRISTOPHER L. LOWE, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

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QUESTION PRESENTED

Whether the First or Fifth Amendment renders invalid the authority granted the Securities and Exchange Commission by the Investment Advisers Act of 1940 to deny or revoke the registration of a publisher of an investment advisory service on the basis of prior criminal conduct.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 725 F.2d 892. The opinion of the district court (Pet. App. A41-A67) is reported at 556 F. Supp. 1359.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1984. A petition for rehearing was denied on February 22, 1984. The petition for a writ of certiorari was filed on May 16, 1984, and granted on October 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. Petitioner Christopher L. Lowe is the president of three corporations—petitioners Lowe Management Corporation, Lowe Publishing Corporation and Lowe Stock

Chart Service, Inc.—through which he has published and distributed two subscription investment advisory services and has solicited subscriptions for a third (Pet. App. A3, A9). Between March 29, 1974, and May 11, 1981, Lowe Management was registered with the Securities and Exchange Commission as an investment adviser pursuant to Section 203(c) of the Investment Advisers Act of 1940 (the Act), 15 U.S.C. 80b-3(c) (Pet. App. A3; C.A. App. 132). In addition to furnishing investment advice through publication, Lowe Management had custody of and managed the funds of advisory clients on a discretionary basis during this period (J.A. 8, 28).

In 1977, Lowe pleaded guilty to two New York misdemeanors related to his investment advisory business. The first offense involved Lowe's fraud on one of his advisory clients by falsely representing that $2,200 had been invested for the client's benefit and a 27% return earned, when in fact Lowe had misappropriated the funds for his own use, in violation of N.Y. Gen. Bus. Law § 352-c (McKinney 1968). The second offense arose from Lowe's failure to register in New York as an investment adviser, in violation of N.Y. Gen. Bus. Law § 359-eee (McKinney 1968). Pet. App. A3. In April 1978, Lowe was sentenced to a three-year period of probation for the first of these offenses and received an unconditional discharge on the second offense (J.A. 9).

In 1978, Lowe pleaded guilty to two more New York offenses, both felonies (Pet. App. A3-A4). The first was again associated with Lowe's advisory business and, once again, concerned the misappropriation of a client's funds. Beginning in 1976, a client who had entrusted $10,000 to Lowe for investment purposes became dissatisfied with his accounting for the money and requested its return. When Lowe failed to return the funds, the client filed complaints with both the Commission and New York authorities (J.A. 66). On at least five separate occasions Lowe tendered a check in settlement, and each time the check was dishonored (*ibid.*). Payment from Lowe was

obtained only when criminal proceedings were instituted against him in state court by the New York authorities (J.A. 66-67).

During those proceedings, Lowe offered as evidence of his purported payment to the client a copy of a money order altered to read $10,000 instead of its true value, $10 (J.A. 10). For this fraudulent attempt to demonstrate to the court that he had paid his former client the full $10,000 owed to him, Lowe was convicted of tampering with physical evidence, in violation of N.Y. Penal Law § 215.40 (McKinney 1975) (Pet. App. A3; J.A. 10).

The second felony conviction resulted when Lowe fraudulently drew a check for $684 (J.A. 10) on his account at Manufacturers Hanover Trust Company, into which he had deposited worthless checks drawn on a closed account (J.A. 68). Lowe was convicted for this conduct of third-degree grand larceny under N.Y. Penal Law § 155.30 (McKinney 1975) (Pet. App. A3-A4; J.A. 10). As a result of these two felony convictions, Lowe was sentenced in 1979 to a prison term of 60 days, to be followed by a probationary period of four years and ten months, and was ordered to make restitution of $8,227, with interest (J.A. 10).

b. In 1979, the Commission instituted administrative proceedings pursuant to Section 203(e) and (f) of the Act, 15 U.S.C. 80b-3(e) and (f), against Lowe and Lowe Management. Following an evidentiary hearing and an initial decision by an administrative law judge, the Commission issued an opinion on May 11, 1981, finding that Lowe willfully aided and abetted willful violations by Lowe Management of the antifraud provisions of the Act (J.A. 64-72).[1] The Commission found that Lowe breached his fiduciary duty to an advisory client when he improperly withheld the client's $10,000 and then made misstatements regarding its return, and that Lowe Man-

[1] *In re Lowe Management Corp.*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,873 (May 11, 1981).

agement violated the reporting provisions of the Act[2] by failing to amend Lowe Management's investment adviser registration form promptly to disclose Lowe's March 1978 convictions relating to his conduct as an investment adviser (J.A. 67). The Commission also invoked the provisions in Section 203(e) and (f) of the Act that make certain of Lowe's New York convictions a separate basis for administrative sanctions (J.A. 68).

The Commission rejected Lowe's argument that there was no need for sanctions because he and his advisory corporation no longer handled clients' funds or securities, but were then solely providing advice by publication (J.A. 69-71). Rather, the Commission found that even their publishing activities afforded "numerous 'opportunities for dishonesty and self-dealing'" (J.A. 71).

Finding that Lowe's conduct "could hardly be more serious" and reflected a "callous disregard" for the high fiduciary standards required of an investment adviser (J.A. 70-71), the Commission issued an order revoking the registration of Lowe Management as an investment adviser and barring Lowe from association with any investment adviser (J.A. 73). Neither Lowe nor Lowe Management sought judicial review of the Commission's order (Pet. App. A4).[3]

c. Despite the May 11, 1981 Commission order, Lowe continued to publish and distribute through his advisory corporations two investment advisory services—the *Lowe Investment and Financial Letter* (*Lowe Letter*) and the *Lowe Stock Advisory*. In addition, Lowe has solicited subscriptions for a third service—the *Lowe Stock Chart Service* (J.A. 15, 28-29). Lowe has also offered to subscribers of six months or longer a recorded telephone "hotline" service claimed to provide "up-to-the-minute advice" on the market (C.A. App. 153, 161, 191). Pet. App. A5.

The *Lowe Letter* is regarded by its readers as an advisory publication designed to aid them in making investment decisions.[4] The legend on the masthead of the publication reveals its attraction to investors: "Market Timing and Stock Selection for Maximum Profits" (see, *e.g.*, J.A. 78). This publication consists of predictions and forecasts of general trends and developments in securities and other markets, followed by advice about specific securities and other investments (J.A. 78-85; C.A. App. 138-189). It offers advice on the relative desirability of investing in, among other things, stocks, treasury bills and money market funds, and it recommends particular stocks or groups of stocks for purchase or sale. Pet. App. A5-A6.

The *Lowe Letter* has been disseminated to varying numbers of clients, ranging from 3,000 clients for the August 21, 1981 issue, to approximately 19,000 clients for the December 11, 1981 issue, with an average of about 4,500 to 5,000 for all other issues (Pet. App. A5; J.A. 32). As of August 20, 1982, the *Lowe Letter* had approximately 2,408 paid subscribers, with an additional 2,448 persons with expired subscriptions continuing to receive issues (J.A. 31). Subscriptions to the *Lowe Letter*

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[2] Section 204 of the Act, 15 U.S.C. 80b-4, and Rule 204-1(b) thereunder, 17 C.F.R. 275.204-1(b).

[3] Subsequent to the Commission's proceedings, Lowe pleaded guilty in 1982 to two felony counts of theft by deception in the third-degree, in violation of N.J. Stat. Ann. § 2C:20-4 (West 1982) (J.A. 74-76). Lowe had fraudulently misrepresented to two New Jersey banks that certain checks were good and negotiable, when in fact he knew they were worthless. Pet. App. A5.

[4] As one client testified (J.A. 36, 37):

> [The *Lowe Letter*] is an investment advisory service to help people with their investments, to guide them through and select the proper securities for investment.
>
> * * * * *
>
> I subscribed to the letter to receive the advice that I needed for investments.

The *Lowe Letter* "is advertised as a semi-monthly publication, but at least since May 1981, it has appeared only at irregular intervals" (Pet. App. A42-A43).

cost from $39 for one year to $79 for three years (Pet. App. A5; C.A. App. 191).

The Lowe Stock Advisory is an investment advisory service specializing in low-priced stocks (under $20) listed on the American Stock Exchange or the New York Stock Exchange or traded in the over-the-counter market (J.A. 39; C.A. App. 192).[5] Its masthead legend—"Sensible Speculations in Low Priced Stocks"—testifies to its appeal to investors (see, *e.g.*, C.A. App. 193, 198). The *Lowe Stock Advisory* typically contains a brief introductory examination of general market or economic trends followed by specific purchase, sale or hold recommendations for low priced stocks (Pet. App. A6). The *Lowe Stock Advisory*, as of August 20, 1982, had approximately 278 paid subscribers and 397 non-paying readers; each issue has been mailed to between 400 and 700 persons (J.A. 32). Subscriptions cost from $39 for one year to $79 for three years (Pet. App. A6; C.A. App. 232).[6]

2. The Commission brought the present action in the United States District Court for the Eastern District of

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[5] The publication has been distributed on an infrequent, irregular basis. See Pet. App. A43.

[6] The *Lowe Stock Chart Service* is advertised as a service containing "[o]ver ten pages of technical and fundamental indicators" for particular stocks traded on the New York Stock Exchange, on the American Stock Exchange and in the over-the-counter market (C.A. App. 203, 205). The sample charts distributed analyze the trading patterns of selected securities and provide information concerning the projected future earnings for certain corporate issuers (see C.A. App. 202-209). This publication, as in the case of the other Lowe publications, is designed to assist clients in their investment decisions. The *Lowe Stock Chart Service* has solicited subscriptions since late 1980 (J.A. 33, 42), and, as of August 20, 1982, had approximately 44 paid subscribers (J.A. 32), who paid from $33 for five weeks of service to $449 for one year (C.A. App. 203, 206). As of the date of trial no issues of the *Lowe Stock Chart Service*, other than a few sample charts (C.A. App. 204-209), had ever been distributed (J.A. 33). See Pet. App. A6, A43-A44.

New York, seeking an order enjoining Lowe and his three corporations from providing investment advice in violation of the Act's registration provisions, enforcing the Commission's 1981 order, and directing disgorgement of subscription monies received (Pet. App. A45). The district court recognized (*id.* at A42) that, in light of Lowe's past criminal conduct, "[t]he SEC's lack of confidence in Lowe is not without basis," but nevertheless refused to enjoin publication of the advisory letters (*id.* at A41-A67). The court decided that a construction of the Act that would authorize the Commission to deny or revoke the registration of an advisory publisher for past misconduct would constitute an improper prior restraint in violation of the First Amendment (*id.* at A54-A55). It therefore held that the Commission could require publishers of investment advisory services to register, but construed the Act to limit the Commission's authority to revoke an adviser's registration to those advisers who provide their services in person and not through publication (*id.* at A52). Accordingly, the court denied the Commission's request for an injunction against petitioners' publication of investment advice, but granted a limited injunction prohibiting them from rendering personal investment advice (*id.* at A67).[7]

3. The court of appeals reversed the district court's denial of an injunction against publication, holding that the Commission's authority under the Act to revoke the registration of investment advisers extends to publishers of investment advisory services and that this statutory authority does not violate the First or Fifth Amendments (Pet. App. A1-A39).[8]

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[7] The court also enjoined petitioners from providing their advice by individual letter or recorded telephone "hotline" service (Pet. App. A67).

[8] District Judge Brieant, sitting by designation, dissented on grounds similar to those stated by the district court (Pet. App. A23-A29). Judge Van Graafeiland joined Judge Oakes' majority opinion and filed a concurrence (*id.* at A20-A22).

The court of appeals found that Congress, in enacting the Advisers Act, recognized the potential for abuse by publishers of investment advice and clearly intended to regulate such publishers. The court concluded that there was no basis in the statute for the district court's distinction between personal and impersonal investment advice. Pet. App. A8-A11. The court also concluded (*id.* at A11-A13) that Lowe's publications were not within the statutory exclusion for a "bona fide newspaper * * * or financial publication of general and regular circulation." § 202(a)(11)(D), 15 U.S.C. 80b-2(a)(11)(D).

With respect to the First Amendment challenge, the court upheld the Commission's regulation of investment advisory publishers on two independent grounds. The court first held that the challenged provisions constitute valid regulation of commercial activity. Citing *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), in which this Court pointed out that government "does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity," the court concluded that "the provisions of the Investment Advisers Act at issue here are precisely the kind of regulation of commercial activity permissible under the First Amendment" (Pet. App. A15). The court recognized numerous examples of commercial regulation permissible under the First Amendment, including regulation of the transfer of information about securities, corporate proxy statements, price and product information among competitors, and certain labor activities (*ibid.*). It considered the registration of advisory publishers to fall within the government's authority to license professionals and noted that "denial of a professional license for criminal conduct has been a traditional, and perhaps necessary, aspect of this type of regulation" (*id.* at A18-A19).

The court of appeals concluded independently that the registration of investment advisers is a valid restriction on commercial speech. The court reasoned that the concept of commercial speech is not limited to advertising and is broad enough to encompass Lowe's publications. Pet. App. A17.

The court rejected petitioners' claim that barring Lowe from the advisory business was an improper prior restraint, whether the Act is viewed as regulation of a profession or of commercial speech. According to the court, the "regulation of professions is intended to prevent harm to the public before it occurs" and merely punishing Lowe for further violations of the securities laws would "hardly be effective redress for the affected public" (Pet. App. A19). Under the commercial speech analysis, the court, relying on *Friedman* v. *Rogers*, 440 U.S. 1, 15 (1979), concluded that "the potential for deception permits government to ban potentially deceptive commercial speech," and that, "[i]n light of Lowe's history of deceptive, criminal conduct as an investment adviser, his publications may fairly be characterized as potentially deceptive commercial speech" that is not entitled to constitutional immunity from regulation (Pet. App. A19).

Finally, the court of appeals rejected Lowe's argument that the statutory exclusion for a "bona fide newspaper * * * or financial publication of general and regular circulation" (§ 202(a)(11)(D), 15 U.S.C. 80b-2(a)(11)(D)) deprived him of equal protection of the laws. Since "the publication of investment advice is regulable commercial activity," the court reasoned, "such newsletters may be treated differently from other publications" (Pet. App. A15-A16 n.5).

SUMMARY OF ARGUMENT

The court of appeals correctly held that the Commission's authority under the Investment Advisers Act to deny or revoke the registration of investment advisory publishers does not violate the First or Fifth Amendments.

I

The Investment Advisers Act is one of several statutes in which Congress sought to prevent recurrence of the serious abuses in the securities markets that contributed to the Great Depression. After extensive study, it was determined that investment advisers, including those who publish their advice in advisory services such as Lowe's, are professionals who have a fiduciary relationship with their clients and who must be regulated in order to protect those clients and the investing public generally. The heart of the regulatory scheme is found in Section 203 of the Act, which requires that investment advisers be registered with the Commission and provides that their registration may be revoked, where necessary to protect the public, on the basis of specified criminal and other misconduct.

All the Commission seeks in this case is to enjoin Lowe's unlicensed practice of the investment advisory profession. Regulation of the professions and of other commercial activity has long been considered within the province of legitimate governmental activity. While such regulation undoubtedly has an effect on speech, that fact does not require application of the full panoply of First Amendment protections, such as the presumption against prior restraints. If it did, governments would be without effective means of engaging in the prophylactic regulation necessary to protect the public from harm.

The Act, like similar professional licensing schemes, is not aimed at suppressing speech. Rather, it is a generally applicable economic regulation. It does not single out the press for special treatment, but treats all advisers alike, whether they provide personal advice or advice through publications. Petitioners concede that prohibiting unlicensed advisers from giving personal investment advice is constitutional. Unless this Court is willing either to invalidate Congress's determination that the publication of advice presents opportunities for abuse similar in magnitude to those presented by personal

advice, or to grant the published written word a special status superior to that of the spoken word, application of the Act to publishers must be upheld.

The commercial speech doctrine is also relevant in this case, which arises in the special context of professional regulation. The communications in question here simply constitute professional advice. They do not relate to political, cultural or philosophical issues, but only to private economic decisionmaking concerning the relative merits of various investments. Whatever the core notion of commercial speech, it would make little sense to afford petitioners' advisory services protection under the First Amendment greater than that to which commercial speech is entitled. The sort of ban on potentially deceptive speech permissible under the commercial speech doctrine is essential for effective regulation of the professions. There is ample justification for prohibiting the publication of investment advice by one with Lowe's criminal record.

II

The Act's exclusion for bona fide newspapers, magazines and financial publications of general circulation does not deprive advisory publishers of the equal protection of the laws. The restrictions in the Act do not infringe fundamental rights and are rationally related to a legitimate governmental interest.

ARGUMENT

I. CONGRESS'S REGULATION OF INVESTMENT ADVISORY PUBLISHERS UNDER THE INVESTMENT ADVISERS ACT OF 1940 IS CONSISTENT WITH THE FIRST AMENDMENT

A. Congress Has Determined That Investment Advisers, Including Those Who Furnish Advice Through Publications, Are Professionals Whose Practice Must Be Regulated In Order To Protect The Public

The Investment Advisers Act of 1940 is premised on Congress's determination that the business of providing investment advice is a professional activity in which abu-

sive practices had harmed both individual clients and the investing public generally. In order to prevent such abuses from recurring, Congress embarked on a modest program of regulation, relying primarily on a requirement that professional investment advisers be registered with the Securities and Exchange Commission, together with a grant of authority to the Commission to deny or revoke the registration of an adviser for criminal or other specified misconduct. An understanding of the Act's provisions and the abuses that prompted their enactment is essential to the resolution of the questions raised by petitioners. See *Virginia State Board of Pharmacy* v. *Virginia Citizen's Consumer Council, Inc.*, 425 U.S. 748, 750 (1976).

1. "The Investment Advisers Act of 1940 was the last in a series of Acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). As the Court recognized, "'[i]t requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail' in every facet of the securities industry." *Id.* at 186-187, quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 366 (1963). Congress studied the abuses in the securities industry and took the action it considered necessary to prevent recurrence of a similar financial disaster.

Congressional concern over the publication of investment advice predates passage of the Investment Advisers Act. The Senate hearings on stock exchange practices, which led to the enactment of the Securities Exchange Act of 1934, revealed widespread abuses by publishers of investment advisory services and other financial publications.[9] The Senate reported that "pool operators"—

[9] *Stock Exchange Practices: Hearings on S. Res. 84 Before the Senate Comm. on Banking and Currency*, 72d Cong., 1st Sess. 302, 446-464, 601-602, 672-712 (1932); *Stock Exchange Practices: Hearings on S. Res. 56 and S. Res. 97 Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 5899-5904 (1934).

groups of investors who agreed to trade actively in a single security to manipulate its price[10]—used market letters[11] and investment advisory services[12] to disseminate false information "designed to excite public attention toward the securit[ies]." S. Rep. 1455, 73d Cong., 2d Sess. 41-45 (1934). Other methods used by pool operators to distribute propaganda included "the employment of professional publicity agents; the subsidizing of financial writers; and the distribution of 'tipster sheets' purporting to emanate from reputable financial services and to contain scientific and statistical data concerning the security" (*id.* at 44).[13]

[10] S. Rep. 1455, 73d Cong., 2d Sess. 45 (1934) (S. Rep. 1455).

[11] Market letters that made favorable comments on a particular stock were distributed by a brokerage firm while interested persons at the firm held options on the stock that would increase in value if the price of the stock rose. S. Rep. 1455, *supra*, at 41-43.

[12] A publisher of an advisory service known as the "Stock and Bond Reporter" publicized particular stocks that formed the basis of pool operations in return for substantial blocks of stock from the pool operators. The publisher also employed newspaper writers to write articles publicizing his stocks and hired a person to broadcast over the radio claiming to be a legitimate economist and president of an independent research organization. Between 1928 and 1930, the publisher was involved in 250 pool operations and realized a net profit of half a million dollars. S. Rep. 1455, *supra*, at 44.

[13] The committee report accompanying the Senate draft of the Securities Exchange Act described the type of abuses then present in the industry:

> [I]t was not uncommon for market operators to employ a publicity agent to tout a stock in which they were momentarily interested. In one instance a financial writer on a great New York newspaper was discovered to have been a regular participant in the profits of a freelance trader, without obligation except to publicize the stocks of the trader. Another witness admitted that his business was "financial publicity" and that his articles were published for the purpose of interesting the public in the stock in which he and those who employed him

It was against this background that Congress enacted the Investment Advisers Act. The Act was a product of the Commission's study of the investment company and investment trust industries undertaken pursuant to Section 30 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79z-4. In studying investment companies, the Commission surveyed the field of investment counsel, management and advisory services. S. Rep. 1775, 76th Cong., 3d Sess. 1, 20 (1940) (Senate Report).

In studying the practices of investment advisers prior to passage of the Act, Congress recognized that investment advisers are professionals who should be subject to regulation similar to that of lawyers and accountants. Dwight C. Rose, president of the Investment Counsel Association of America, testified that the relationship between investment advisers and their clients is "inherently a professional one, similar to that involved in the practice of law or accountancy." *Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d Sess. 738 (1940) (Senate Hearings). Senator Wagner, sponsor of the original bill, compared the registration of investment advisers to the licensing of lawyers, real estate brokers, insurance brokers and registered nurses (*ibid.*). Congress was aware, moreover, that a leading investment counsel association had endorsed the view that the "[m]aintenance of high standards of integrity, competence, and practice" was crucial to the advisory profession to keep the profession "free from all forms of abuse." Senate Hearings 723.

Congress also recognized that, as professionals, investment advisers maintain a fiduciary relationship with their clients. See *Capital Gains Research Bureau, Inc.*, 375

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were interested, thereby causing the market value of the stock to increase; and for his work he was paid by calls and options. Still other cases were observed where persons were employed to broadcast over the radio, ostensibly as economists tendering gratuitous advice, but in reality as publicity agents of stock-exchange firms.

S. Rep. 792, 73d Cong., 2d Sess. 8 (1934).

U.S. at 191, 194. It realized that the relationship between an investment adviser and his client was one "where fraud can wreak havoc." Senate Hearings 745. See *Marketlines, Inc.* v. *SEC*, 384 F.2d 264, 267 (2d Cir. 1967) (per curiam), cert. denied, 390 U.S. 947 (1968) (affirming revocation of an advisory publisher's registration). Accordingly, Congress sought in the Act to protect the public against abuse by unscrupulous advisers of their position as trusted fiduciaries. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 190-195.

Significantly, concern in regulating the investment advisory profession was not limited to those advisers who provided personal advice to individual clients, but extended to those who advised their clients through publications as well. Indeed, the danger that large numbers of people will be misled to their detriment or that the investing public generally will be harmed is considerably greater when advice is broadly disseminated through publication. Many of the abuses of which Congress was aware and that formed the basis for its decision to regulate the profession were the product of unethical advisory publishers.

National regulation of investment advisory publishers was deemed necessary because of "their potential influence on security markets and the dangerous potentialities of stock market tipsters imposing upon unsophisticated investors." [14] Thus, Congress was concerned with two

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[14] Senate Report 21. These "dangerous potentialities" were outlined in a memorandum submitted to Congress by the Commission:

> The reason for considering these generalized investment services in relation to possible regulation, is to be found in the greatly varying types of news, facts, and conjectures that are circulated. Criticism is also prevalent of advertising policies which sometimes involve great overemphasis of the value of the service supplied and of the profits which can be expected from the use of such services. Then, too, question [sic] may arise as to the good faith of some of the less reputable of these generalized investment services.

Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency,

types of injury: harm to investors trading generally in the market,[15] and direct harm to individual subscribers caused by the investment advice they received. A memorandum submitted to Congress by the Commission emphasized the potential abuses arising from the business of publishing investment advice, particularly when the persons involved are lacking in integrity:

> Often * * * they are not honest but open to suspicion of willingly lending themselves to the use of stock market promoters and manipulators who seek to influence the course of security prices through the use of propaganda. * * * The worst forms of tipster sheet exist for no other reason than to lure the investor and gambler to their financial ruin.[16]

Congressional concern with the segment of the profession involving advisory publications was amply demonstrated at the hearings and in the committee reports. The legislation was intended to cover all "investment advisers," a profession found to "encompass[] that broad category ranging from people who are engaged in the profession of furnishing disinterested, impartial advice to a certain economic stratum of our population to the other extreme, individuals engaged in running tipster organizations, or sending through the mails stock market letters." *Senate Hearings* 47; see also Senate Report 21; *Investment Trusts and Investment Companies: Hearings on H.R. 10065 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 3d Sess.

76th Cong., 3d Sess. 1008 (1940) (Senate Hearings) (Memorandum entitled "Statutory Regulation of Investment Counselors," prepared by Research Department, Illinois Legislative Council).

[15] Investment advisory publishers can have a significant impact on trading in the stock market. In *Capital Gains Research Bureau, Inc.*, 375 U.S. at 183, for example, this Court noted that on six different occasions, an increase in price and trading volume of a security resulted within days of the publication of a favorable report on that security.

[16] Senate Hearings 1008, quoting Twentieth Century Fund, Inc., *The Security Markets* 692 (1935).

87 (1940). Indeed, coverage encompassing advisory publishers is made clear on the face of the statute. In its statement of findings in Section 201, 15 U.S.C. 80b-1, Congress found that the "advice, counsel, *publications*, writings, analyses, and reports" of investment advisers "occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy" (emphasis supplied). In order to provide protection against injurious practices of publishers of investment advice, the term "investment adviser" was defined in the Act to include any person who "engages in the business of advising others, either directly or *through publications* or writings, as to the value of securities or as to the advisability of investing in * * * securities * * *." § 202(a)(11), 15 U.S.C. 80b-2(a)(11) (emphasis supplied).

In *SEC* v. *Capital Gains Research Bureau, Inc.*, *supra*, the Court thoroughly reviewed the legislative history of the Act. It found that Congress intended to subject publishers of investment advisory services to regulation, and to recognize under federal law the fiduciary relationship that exists between investment advisory publishers and their clients. 375 U.S. at 187 n.15, 191, 194. The Court held that the Commission could obtain an injunction requiring an investment advisory publisher to disclose to his clients his practice of "scalping," that is, purchasing shares of a security before recommending it and then selling them at a profit immediately following the recommendation. In so holding, the Court relied on Congress's intent to regulate the fiduciary relationship between investment adviser and client (*id.* at 191-195). The Court did not suggest that a different standard governs those who provide investment advice to clients through publication; indeed, its holding demonstrates precisely the opposite.[17]

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[17] The Act excludes from the definition of an "investment adviser" any "bona fide newspaper, news magazine or business or financial publication of general and regular circulation." § 202(a)(11)(D),

2. Despite the seriousness of the abuses brought to Congress's attention, the actual scheme of regulation it

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15 U.S.C. 80b-2(a)(11)(D). Petitioners do not raise before this Court the argument rejected by the court of appeals (Pet. App. A11-A13) that Lowe's publications come within this exclusion. Amicus American Civil Liberties Union (ACLU), however, does raise this point (Br. 2-10). Its argument is without merit. The ACLU omits any discussion of the statutory language, basing its argument solely on portions of the legislative history. But petitioners cannot come within the statutory terms: Lowe's publications are not newspapers or magazines (see J.A. 78-85), nor are they of general circulation. This being so, there is no cause to look beyond the statutory language to its legislative history. *E.g.*, *United States* v. *Clark*, 454 U.S. 555, 560 (1982). Moreover, the Commission's interpretation of the exclusion (see page 50, *infra*) not to encompass publications such as petitioners' is entitled to substantial deference. *E.g.*, *Schweiker* v. *Hogan*, 457 U.S. 569, 588 (1982).

A number of other factors also compel the conclusion that Lowe's publications are not within the statutory exemption. The ACLU's argument would read Congress's express inclusion of advisers who provide advice "through publications" (§ 202(a)(11), 15 U.S.C. 80b-2(a)(11)) out of the Act: if Lowe's publications, which are purchased for no other reason than to obtain investment advice, are not within the coverage of the Act, no publication could be. Moreover, Congress had before it abundant evidence of abuses by publishers, not merely by personal advisers (see pages 12-13, 15-16, *supra*). It expressly found that "publications" of investment advisers were cause for regulatory action (§ 201, 15 U.S.C. 80b-1). Regulation of publications such as Lowe's is fully consistent with the purpose of the Act. See *SEC* v. *Wall Street Transcript Corp.*, 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970). Significantly, this Court in *Capital Gains Research Bureau, Inc.* applied the Act to the publisher of a monthly report sent to 5,000 subscribers, and approved an injunction requiring certain disclosures by the publisher; there is no indication in the Court's opinion that the investment adviser there also provided personal advice (375 U.S. at 182-183). Had application of the Act to an advisory publisher in *Capital Gains Research Bureau, Inc.* rested on a misinterpretation of the exclusion, Congress would presumably have rectified it when it passed substantial amendments to the Act in 1970 and again in 1975, 8 and 13 years after the Court's decision. See, *e.g.*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 385-386 (1983); *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 381-382 (1982); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

developed for investment advisers was not extensive. Congress did not "even remotely presume to undertake to pass upon their qualifications."[18] Rather than limit access to the advisory profession to persons meeting certain educational standards or financial responsibility requirements (as Congress has done, for example, under the Securities Exchange Act in the case of broker-dealers[19]), Congress required only that the applicant not have engaged in certain specified misconduct involving securities. § 203(e), 15 U.S.C. 80b-3(e). But that disqualification provision was viewed by Congress as vitally important. The need to prevent such persons from engaging in the profession was emphasized in the "declaration of policy" contained in the original bill, which stated that

> the national public interest and the interest of investors are adversely affected—* * * when persons of proven lack of integrity in financial matters are permitted to engage in business as investment advisers * * *.

S. 3580, 76th Cong., 3d Sess. § 202 (1940).[20] This concern was embodied in what is now Section 203(e) of the Act, 15 U.S.C. 80b-3(e), which grants the Commission authority to deny or revoke registration on the basis of certain types of prior misconduct.[21]

As explained by David Schenker, Chief Counsel of the Commission's Investment Trust Study, the Act "merely requires registration, and seeks to prevent frauds and

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[18] Senate Hearings 50.

[19] See Section 15(b)(7) and (c)(3) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(7) and (c)(3).

[20] Although this "declaration" was deleted from the final version of the Act, the Court in *Capital Gains Research Bureau, Inc.*, explained (375 U.S. at 191 n.34) that it was omitted *not* "because Congress had concluded that the abuses had not occurred * * *," but because Congress wanted "to avoid condemning an entire profession (which depends for its success on continued public confidence) for the acts of a few."

[21] This authority was in Section 203(d) of the original Act (54 Stat. 851).

keep out jailbirds and security racketeers."[22] Robert Healy, then Commissioner of the SEC, stated that the real intent of the Act was "to see to it that men with this kind of [criminal] record cannot go into the business of being investment advisers."[23] This was accomplished through the registration provisions, the heart of the Act, by requiring advisers "to register with the Commission, which is empowered to deny or revoke the registration * * * of individuals convicted or enjoined by the courts for securities fraud." H.R. Rep. 2639, 76th Cong., 3d Sess. 28 (1940). Thus, the Act "reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship.'" *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 191, quoting 2 L. Loss, *Securities Regulation* 1412 (2d ed. 1961).

Congress reaffirmed its concern with the potential for harm if persons guilty of misconduct involving financial matters were permitted to engage in the investment advisory business in 1960 when it amended Section 203(d) of the Act to expand the grounds for denial or revocation of registration. Pub. L. No. 86-750, § 3(b), 74 Stat. 885.[24]

> The committee is aware that the opportunity to advise others how to invest their money is becoming

[22] Senate Hearings 995.

[23] *Id.* at 757.

[24] The abuses surrounding publication of investment advice did not end with passage of the Act. As one former senior Commission official noted in 1959:

> The publishers of miscellaneous reports and letters present a particularly troublesome problem. In addition to many legitimate services, there appear to be some eccentrics, some sensationalists who promise miracles in the market which they can hardly deliver, and some out and out tipsters. Much of the Commission's enforcement work under the act has been devoted to the latter element.

Loomis, *The Securities Exchange Act of 1934 and the Investment Advisers Act of 1940*, 28 Geo. Wash. L. Rev. 214, 249 (1959) (citations omitted); see also *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 181, 183 (describing the recurrent abusive practice by unethical advisory publishers known as "scalping").

> increasingly popular and lucrative. There are now over 1,800 advisers registered under the act. The committee is convinced that under the present law increasing opportunities exist for unscrupulous persons to practice as advisers. Therefore, new grounds for denying entrance into the field or revoking the registration of an adviser have been added.

S. Rep. 1760, 86th Cong., 2d Sess. 2 (1960). The 1960 amendment to Section 203(d) (74 Stat. 885) was intended to make it possible for the Commission to "exclude any person who has been convicted of a financial type crime,"[25] such as embezzlement, fraudulent conversion or misappropriation of funds or securities, or who has been convicted of mail fraud, or who is found by the Commission to have willfully violated certain of the federal securities laws.[26] These provisions were again amended in 1975[27] to conform to similar registration provisions for broker-dealers in the Securities Exchange Act and to expand further the grounds for denial or revocation of registration. § 203(c)(2) and (e), 15 U.S.C. 80b-3(c)(2) and (e).[28]

Finally, it should be emphasized that denial or revocation of an investment adviser's registration is neither required nor automatic upon a finding that the person has engaged in conduct or been convicted of a crime listed in the statute as a ground for disqualification. Rather, the Commission is authorized to impose sanctions only when it finds, after a hearing, that the sanctions are "in the public interest" (§ 203(e), 15 U.S.C. 80b-3(e)).[29]

[25] *Securities Act Amendments, 1959: Hearing Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 117 (1959).

[26] Pub. L. No. 86-750, § 3(b), 74 Stat. 885.

[27] Pub. L. No. 94-29, § 29, 89 Stat. 167.

[28] Among the grounds added by the 1975 amendments were conviction for specified crimes involving dishonesty and theft or any crime arising out of the business of a bank, insurance company or fiduciary.

[29] Mr. Schenker explained that even though an applicant had engaged in securities fraud, the disqualification would not be automatic:

Moreover, a wide range of sanctions are available, including suspension of registration and the placing of limitations on an adviser's professional activities (*ibid.*). The Commission may therefore tailor an appropriate sanction to the danger to the public presented by a particular person's practice of the investment advisory profession. See generally *Marketlines, Inc.* v. *SEC*, 384 F.2d at 267. Any sanction imposed by the Commission is subject to review in the courts of appeals (Section 213 of the Act, 15 U.S.C. 80b-13).[30]

B. Persons Demonstrating A Lack Of Integrity In Financial Matters May Be Prohibited From Engaging In The Practice Of The Investment Advisory Profession, Including The Publication Of Investment Advice

It is plainly within the government's power to regulate the practice of professions in order to protect the public. That authority encompasses both the power to license

> If they have been convicted in connection with a securities fraud, * * * we have the right—we are not under duty—after considering all the factors, if we think that the public interest would be injured, to say that "We will not register you."

Senate Hearings 50.

[30] Petitioners did not take advantage of their right to seek review in the court of appeals of the Commission's order in the administrative proceedings in which Lowe Management's registration was revoked (see page 4, *supra*); nor do they now contend that the sanction imposed, if constitutional, was excessive in light of Lowe's past criminal activities.

Petitioners' argument (Br. 19-20) that the Act vests an impermissible degree of discretion in the Commission is insubstantial. Revocations are authorized only where one of the statutorily prescribed disqualifications is present. The requirement that the Commission also determine that revocation is in the "public interest"—a requirement that provides additional protection to those in petitioners' position—does not grant the Commission an undue quantum of discretion. See, *e.g.*, *NAACP* v. *Federal Power Comm'n*, 425 U.S. 662, 669 (1976); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216 (1943); *New York Central Securities Corp* v. *United States*, 287 U.S. 12, 24-25 (1932).

those who would engage in a profession and, as a necessary corollary, the power to forbid its practice by those who are not licensed. Despite the indirect effect such regulation may have upon speech, it has, with good reason, not been thought to amount to a prior restraint or otherwise to violate the First Amendment.

The registration provisions of the Investment Advisers Act at issue protect the public by regulating commercial activity—the furnishing of professional advice with respect to trading in securities. The Act is comparable to the regulation of other professions where, as here, licensing schemes serve important public interests. Publishers are not singled out for special burdens, but rather are encompassed within a single scheme applicable generally to the investment advisory profession. Lowe's advisory activities have been enjoined as a prophylactic measure to protect the public from the potential for harm arising from professional practice by one with his criminal background. His position is no different from that of a lawyer, doctor or other professional who continues to practice notwithstanding the revocation of his license.

Petitioners admit (Br. 29) that personal investment advice may be licensed and enjoined. Their arguments ultimately amount to nothing more than a disagreement with Congress over whether the potential for harm resulting from the publication of investment advice is sufficiently great that it should be included within the regulated profession. There is no basis for the Court to invalidate Congress's determination.

1. *As a means of serving important public interests, including the regulation of commercial activity, the government may license and set standards for admission to the professions and regulate their practice, notwithstanding an indirect effect on speech*

a. The government may properly regulate commercial activities, notwithstanding an indirect effect on speech. In *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978), for example, this Court upheld disciplinary ac-

tion against an attorney for engaging in prohibited in-person solicitation of clients. The Court held (436 U.S at 456-457) that the government "does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity," and pointed (*id.* at 456) to

> [n]umerous examples * * * of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (CA2 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States*, 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

See also *National Labor Relations Board* v. *Retail Store Employees Union, Local 1001*, 447 U.S. 607, 616-619 (1980) (ban on secondary picketing); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 696-699 (1978) (injunction against publication of canon of ethics of professional engineers to remedy antitrust violation). In each of these cases, legislation aimed at regulating commercial activity was upheld even though the regulation had an indirect impact on speech.

As Justice Black stated for a unanimous Court in *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949), "'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Id.* at 502, quoted in *Ohralik*, 436 U.S. at 456. Investment advisers, like other professionals and other persons engaging in commercial activity, can claim no First Amendment immunity from general commercial regulations not directed at suppressing speech.

b. This Court has consistently found that licensing of the professions clearly falls within the scope of legitimate

governmental regulation. *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 460; *Watson* v. *Maryland*, 218 U.S. 173, 177-178 (1910) ("regulations of a particular trade or business essential to the public health and safety are within the legislative capacity of the State * * * unless such regulations are so unreasonable and extravagant as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily"); *Dent* v. *West Virginia*, 129 U.S. 114, 121-123 (1889). The Court has recognized that the government has a compelling interest in the practice of professions and that, as part of its "power to protect the public health, safety and other valid interests [it] ha[s] broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975). In *Ohralik*, for example, the Court affirmed an order suspending an attorney indefinitely from the practice of law despite his First Amendment challenge, stating that the government "bears a special responsibility for maintaining standards among members of the licensed professions" (436 U.S. at 460).

The government's authority to regulate the professions plainly includes the power to deny or revoke a professional license for criminal conduct demonstrating that the person is unfit to practice the profession. *Barsky* v. *Board of Regents*, 347 U.S. 442, 451 (1954).[31] It is the

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[31] Should the Court conclude, contrary to our submission, that the revocation and bar provisions of the Act are unconstitutional, it should at least uphold, as did the district court (Pet. App. A66), the requirement that publishers of investment advice register with the Commission. See generally *Young* v. *American Mini Theaters, Inc.*, 427 U.S. 50, 62 (1976); *Buckley* v. *Valeo*, 424 U.S. 1, 60-74 (1976); *United States* v. *Harriss*, 347 U.S. 612 (1954). And whatever relief the Court determines is necessary, it should not wholly exempt advisory publishers from the coverage of the Act—such a course would exempt publishers from the operation of the antifraud provisions (§ 206, 15 U.S.C. 80b-6), which neither petitioners nor amici claim are unconstitutional as applied to publishers. Petitioners seek (Br. 46-47) only a determination that the *revocation and bar* provisions (§ 203(e) and (f), 15 U.S.C. 80b-3(e) and (f)) are invalid as applied to publishers.

essence of professional licensing that injury be prevented by prohibiting unauthorized practice rather than merely redressed, if at all, after the harm has occurred. While speech may be used in the course of practicing a profession, a disciplinary scheme grounded in the protection of the public and not triggered by an applicant's exercise of his First Amendment rights does not amount to an unconstitutional prior restraint. There is, as the Court has noted, no First Amendment right to practice a particular profession. *Board of Regents* v. *Roth*, 408 U.S. 564, 575 n.14 (1972).

While the licensing of professionals may by its very nature be viewed as a prior restraint on speech, the doctrine that such restraints bear "a heavy presumption against [their] constitutional validity" [32] is simply not applicable in this area, for a number of related reasons. First, professional licensing schemes are not aimed at suppressing speech, but at ensuring that those who provide advice or services on which the public must rely are qualified to do so. See *Barsky* v. *Board of Regents, supra.* That speech may be affected indirectly does not turn an otherwise valid regulatory program into an unconstitutional prior restraint. Lowe Management's registration, for example, was not revoked in response to speech with which the government disagreed or in order to suppress such speech, but on the basis of Lowe's prior criminal conduct. Cf. *Connick* v. *Myers*, 461 U.S. 138, 142 (1983); *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968).

Moreover, the principal objection to prior restraints—that speech will be suppressed before it can be ascertained with relative certainty that it is unprotected by the First Amendment [33]—is wholly inapplicable to the professional licensing context. The Investment Advisers Act, like similar professional licensing schemes, does not seek

[32] *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (per curiam).

[33] See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973).

to censor any particular message based on its harmful impact, but to ensure that only persons of integrity are providing the professional service in question.[34] It is only in this way that the public may adequately be protected. This Court has recognized as much in upholding against First Amendment attack regulatory schemes that could be characterized as prior restraints. *Ohralik* v. *Ohio State Bar Ass'n, supra*; *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) (prohibition on use of mails in order to prevent fraud).

2. *Petitioners may constitutionally be prohibited from engaging in the unauthorized practice of the investment advisory profession*

a. The regulation of investment advisers established by Congress in the Act falls well within its power to license members of a profession engaged in commercial activity with an effect on interstate commerce. As we have demonstrated (pages 11-22, *supra*), the Investment Advisers Act was part of a series of statutes designed to eliminate abuses in the securities markets. In determining to regulate investment advisers, Congress was legitimately concerned with the frauds and other abuses perpetrated by advisers in the past, and concluded that regulation of the profession was necessary to prevent a recurrence of those abuses and the financial ruin experienced by the nation following the stock market crash in 1929. Accordingly, it decided to require the registration, with certain exceptions, of those persons who, for compensation, engage in the profession of advising others "as to the value of securities or as to the advisability of in-

[34] *Freedman* v. *Maryland*, 380 U.S. 51 (1961), relied on by petitioners (Br. 20-21), is therefore inapposite. Petitioners received the benefit of a hearing before the Commission took action, and had the opportunity to appeal to the court of appeals (§ 213(a), 15 U.S.C. 80b-13(a)). Because the Commission's order did not depend on any particular communications made by petitioners but only on Lowe's status as one convicted of crimes listed in the Act—a status Lowe does not contest—no additional procedures were required for an assessment of those communications.

vesting in, purchasing or selling securities." § 202(a)(11), 15 U.S.C. 80b-2(a)(11).

There can be no doubt that regulation of commercial activity related to the securities markets, including that undertaken in the Investment Advisers Act, is precisely the kind of regulation that is permissible under the First Amendment. The government's interest in ensuring the integrity of the securities markets is wholly " 'unrelated to the suppression of free expression.' " *Members of the City Council* v. *Taxpayers for Vincent*, No. 82-975 (May 15, 1984) slip op. 14, quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).[35] The Act applies whether advice is given "directly" or "through publications or writings" (§ 202(a)(11), 15 U.S.C. 80b-2(a)(11)). Although this particular case involves an advisory publisher, the Act applies to all investment advisers whether they give their advice in person, over the telephone, through personal letter or through publications of wider circulation. In fact, the Act also applies to persons who render their advice through the exercise of discretionary control over the investment of their clients' funds. Thus, its coverage does not turn on the presence of speech, or on the form of that speech, but on the rendering of professional advice to a client with respect to the client's purchase and sale of securities—a commercial activity "in which speech is an essential but subordinate component." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 457.[36]

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[35] For that reason, this Court in *Ohralik* (436 U.S. at 456) could point to the "exchange of information about securities" at issue in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969), which involved a press release by a corporation about a significant corporate development (401 F.2d at 845-846), and the dissemination of corporate proxy statements at issue in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), as commercial activity subject to federal regulation, despite the clear impact on speech of such regulation. Lowe's investment advisory publications are subject to the scheme of federal securities regulation to the same extent.

[36] This case is wholly unlike *In re Primus*, 436 U.S. 412 (1978), in which professional disciplinary action infringed on protected political expression. See pages 40-42, *infra*. Rather, it is controlled by *Ohralik*, decided the same day as *Primus*: Lowe's asserted "speech" interest is merely in practicing his profession. This is not sufficient to outweigh the strong public interest in preventing the harm that could result.

The securities laws, including the Investment Advisers Act, are broad prophylactic measures intended to prevent harm to the investing public. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195 (1976). A necessary element of this type of regulation is the ability to preclude persons of proven lack of integrity in financial matters from engaging in the profession. Congress's conclusion that investment advisers must meet a high standard of character in order to protect the unsuspecting public is reflected in Section 203(e) of the Act, which authorizes the Commission to deny or revoke the registration of investment advisers on the basis of certain types of prior misconduct (see pages 19-21, *supra*).

The justification for such a system of regulation is readily apparent: after-the-fact sanctions against offenders would be wholly inadequate. For example, when an advisory service has improperly touted a stock and artificially inflated its price, the numerous investors who have relied on the recommendation and are seriously injured when the price subsequently collapses may be without effective redress for their trading losses (see Pet. App. A49). Moreover, investors generally, and ultimately the public as a whole, are harmed by the movement of resources in response to artificial price signals. As in other professions, prophylactic regulation is necessary to provide adequate protection to the public, particularly in light of the fiduciary relationship between investment advisers and their clients. See generally *Halsted* v. *SEC*, 182 F.2d 660, 668 (D.C. Cir.), cert. denied, 340 U.S. 834 (1950). This Court has therefore affirmed professional regulation that has an impact on speech even in the absence of actual fraudulent conduct in the particular case. *Ohralik* v. *Ohio State Bar Ass'n*, *supra*.

Lower courts have recognized the public interest in denying unfit persons access to the investment advisory profession, "an occupation which can cause havoc unless engaged in by those with appropriate background and standards." *Marketlines, Inc.* v. *SEC*, 384 F.2d at 267.[37] In that case, the court of appeals affirmed a Commission order revoking the registration of an investment advisory publisher, reasoning that the fact that the publisher "was found guilty of various crimes * * * is quite relevant to a determination as to whether it is in the public interest for him to continue as an investment adviser" (*ibid.*). Cf. *SEC* v. *Suter*, 732 F.2d 1294 (7th Cir. 1984).

In a closely analogous situation, the court in *Savage* v. *CFTC*, 548 F.2d 192 (7th Cir. 1977), rejected a First Amendment challenge to the Commodity Futures Trading Commission's denial of registration of a publisher of a weekly commodities newsletter. The CFTC had denied registration on the ground that the applicant's past violations of the federal securities laws demonstrated his unfitness to act as an adviser. The court of appeals viewed the statutory authorization to deny or revoke the registration of advisory publishers on the basis of past misconduct as reflecting a "legislative conclusion that trading advisors must meet a high standard of character in order to protect unsuspecting traders" (*id.* at 197).

[37] Petitioners cite (Br. 18) a number of cases for the proposition that the states may not revoke the license of a bookstore or movie theater for prior criminal activity. See, *e.g.*, *Cornflower Entertainment, Inc.* v. *Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980). These cases are inapposite because they arise outside the context of the regulation of a profession, where this Court has long recognized that the government's right to regulate clearly includes the power to deny or revoke a professional license for criminal conduct. *Barsky* v. *Board of Regents*, 347 U.S. at 451. The fiduciary relationship between an investment adviser and his client is far closer, and carries a far greater potential for harm, than the relation of a theater or bookstore owner to his customers. The relationship of trust and confidence inherent in the advisory relationship enhances the opportunity for fraud and overreaching by the adviser. Thus, the Act's provisions, designed to ensure the adviser's trustworthiness and honesty, are of critical importance.

The court in *Savage* rejected the publisher's contention that denial of registration was an unconstitutional prior restraint, reasoning that Congress legitimately determined that the most appropriate means of preventing harm to the public was to preclude dishonest persons from engaging in the profession, not to impose sanctions after the harm has occurred (*ibid.*):

> At issue here is not the worth or accuracy of Savage's publication * * *. He might well have advised his clients with skill as to what commodities to buy or sell. But Congress was interested in the character of the adviser and publisher—not his advice or publication—and in its desire to protect the public it had a right to evince this interest.
>
> In appraising Savage's contentions, we must be mindful of a Congressional purpose, clearly evidenced since 1933, to protect the American investing and speculating public not only from fraud and fraudulent practices, but from those whose past actions indicate that they might be tempted to engage in such practices.

b. Stripped to its essentials, petitioners' argument—and that of their supporting amici—is that the First Amendment grants Lowe the right to engage in the unauthorized practice of giving investment advice through publication, notwithstanding the revocation of his professional license for prior criminal conduct. They respond[38] in two ways to the argument that investment advisers are professionals who may be licensed. First, it is suggested that publishers of investment advice should not be regarded as professionals even if personal advisers are. Second, it is suggested that publishers of written material, even if professional advisers, are entitled to special constitutional protection denied personal advisers. Neither point has merit.

Petitioners admit (Br. 29) that "personal investment advisers who give personal advice to individual clients

[38] See Pet. Br. 25-29; Reporters Committee for Freedom of the Press, et al. (RCFP) Br. 16-20; ACLU Br. 15-18; Association of American Publishers, Inc. (AAP) Br. 12-14; AFL-CIO Br. 10-15.

may be licensed as professionals and their licenses may be revoked for misconduct." [39] They would distinguish the publication of investment advice by relying on cases holding that the publication of legal materials does not constitute the practice of law. See, *e.g.*, *New York County Lawyers' Ass'n* v. *Dacey*, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967), adopting the dissenting opinion of the Appellate Division, 28 A.D.2d 161, 283 N.Y.S. 2d 984 (1967). This reliance is misplaced. Congress has determined, and this Court has recognized,[40] that a *fiduciary relationship* exists between publishers of investment advice and their clients, and that the dangers arising from the unregulated furnishing of advice through publication are sufficiently great to justify government action (see pages 15-17, *supra*). While the practice of law has historically been characterized by personal advice,[41] the investment advisory profession has not. As we have demonstrated, Congress studied the investment advisory profession in 1940 and found that the profession includes both types of advisers. Based on its findings, it determined to eliminate the abuses associated with investment advisory publishers as well as with personal advisers.[42] Neither

[39] Amici ACLU (Br. 16) and the AFL-CIO (Br. 13) expressly agree. The logic of the arguments of the other amici compels a similar concession.

[40] *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 191, 194.

[41] The New York Court of Appeals in *Dacey* held that the publication of a book entitled *How to Avoid Probate!* did not constitute the practice of law. The opinion adopted by the court, however, turned on the particular nature of the legal profession, not on any broad determination that no profession can encompass publication. That opinion reasoned (283 N.Y.S.2d at 998; emphasis added):

> There is no personal contact or relationship with a particular individual. Nor does there exist that relation of confidence and trust so necessary to the status of attorney and client. This is the essential of *legal practice*—the representation and the advising of a particular person in a particular situation.

[42] Indeed, had the New York State legislature reasonably found similar abuses in the publication of legal advice and acted to bring

petitioners nor amici point to any facts that would justify this Court's invalidation of that legislative determination.[43]

Petitioners seek to bolster their argument by contending that their publications cannot be viewed as regulable professional or commercial activity in which speech is a "subordinate component" because publishing written materials "is the *only* activity in which they are engaged" (Br. 28; emphasis in original). But the Act regulates the furnishing of investment advice regardless of the medium; it encompasses pure conduct where advice is given through the management of a client's funds. And many professions, including the practice of law, involve only or primarily speech. Petitioners' argument sweeps

such activities within its regulation of the legal profession, the court in *Dacey* presumably would have upheld such regulation under the First Amendment. There the court stated (283 N.Y.S.2d at 1000):

> Of course if the exercise of Dacey's right to freedom of speech by this publication violates reasonable standards erected for the protection of society, or of important interests of society, his right would be subordinated for the common good and the protection of the whole.

[43] Our argument that licensing provisions are permissible in the context of the regulation of professional activity is not, as amicus AAP suggests (Br. 13-14), simply a "bootstrap operation." The determination that the publication of investment advice constitutes practice of the profession was made by Congress on the basis of the history of unethical practices in which publishers had engaged to the detriment of investors and the public. It is on this determination that our argument rests, not on a bare use of labels.

AAP also argues (Br. 20-21) that the Commission's interpretation of the Act is impermissibly broad because it could require registration of authors and publishers of books. This argument is irrelevant to the regulation of Lowe's newsletters. In any event, AAP misconstrues SEC Release No. IA-563, on which it relies. The release provides publishers and authors an explicit safe harbor from regulation; it does not require registration of all those whose publications fall outside its terms. To the contrary, only those who fall outside the safe harbor and are found, on an individual basis, to come within the statutory definition of an investment adviser would be subject to the Act.

much too broadly: it would require the invalidation of a wide variety of licensing schemes whose necessity is undoubted and whose propriety has gone unquestioned. There is no principled distinction between Lowe and the disbarred lawyer who asserts a First Amendment right to advise clients and file briefs and present oral argument on their behalf. The states' ability to license lawyers who limit their practice to the giving of advice,[44] for example, would, therefore become constitutionally vulnerable. Moreover, because an investment adviser who provides only personal advice must do so through speech, he could claim, on petitioners' theory, the same immunity from regulation as is contended publishers enjoy. Such a result is at odds with their concession that personal advisers may be regulated. Finally, the compelling interests in protecting the public from harm that prompted Congress to regulate the profession and that form the basis for the regulation of other professions justify such licensing schemes regardless of the degree to which the bulk of any particular profession's activities consist of speech. As this Court has stated:

> "[T]o say that the ordinance presents a First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation*." *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 561 (1981) (Burger, C.J., dissenting). It has been clear since this Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest.

Members of the City Council v. *Taxpayers for Vincent*, No. 82-975 (May 15, 1984), slip op. 13.

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[44] Many lawyers provide advice in a manner quite similar to an investment adviser's use of newsletters: they regularly distribute to several clients advice based on recent developments in a particular legal area, without tailoring the advice to each client's individual needs. This constitutes the practice of law, and as such plainly falls within the sort of activity that could be enjoined were the attorney disbarred.

Petitioners are not entitled to any special First Amendment privilege simply because they provide published rather than personal advice. If Lowe can be subject to government regulation when he recommends securities to one client, as he admits (Br. 29), he may be subject to regulation when he sends his recommendations by publication to 100 clients or 1,000 clients. As Justice Harlan noted for a plurality of the Court in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 150 (1967) (citations and footnotes omitted):

> A business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws * * *." Federal securities regulation, mail fraud statutes, and common-law actions for deceit and misrepresentation are only some examples of our understanding that the right to communicate information of public interest is not "unconditional."

This Court has emphasized that "the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and Federal Government can subject newspapers to generally applicable economic regulation without creating constitutional problems." *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983).[45] The statute must not, however, single out the press for special treatment and thereby place an undue burden on the freedom of the press. See *id.* at 582-583 (tax on printing materials);

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[45] See, *e.g.*, *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139-140 (1969) (antitrust laws); *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155-156 (1951) (same); *Breard* v. *Alexandria*, 341 U.S. 622 (1951) (prohibition of door-to-door solicitation); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192-193 (1946) (Fair Labor Standards Act); *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178 (1946) (same); *Associated Press* v. *United States*, 326 U.S. 1, 6-7, 19-20 (1945) (antitrust laws); *Associated Press* v. *NLRB*, 301 U.S. 103, 132-133 (1937) (National Labor Relations Act); *SEC* v. *McGoff*, 647 F.2d 185, 190 (D.C. Cir.), cert. denied, 452 U.S. 963 (1981) (Securities Exchange Act); *Zweig* v. *Hearst Corp.*, 594 F.2d 1261 (9th Cir. 1979) (Securities Exchange Act); see also *Branzburg* v. *Hayes*, 408 U.S. 665 (1972) (enforcement of subpoenas).

Grosjean v. *American Press Co.*, 297 U.S. 233 (1936) (licensing tax on publishers unconstitutional).

The Investment Advisers Act does not single out the press, but instead requires registration of all persons who engage in the business of rendering investment advice "directly" or "through publications or writings." Thus, the Act is not, as petitioners contend (Br. 16), a "[l]icensing of the press." It applies to all investment advisers whether they give their advice in person or through publications. In fact, the Act primarily affects the rendering of personal investment advice. Of the more than 9,000 registered investment advisers, only about 500 give investment advice solely through periodic publications. This is no reason for exempting all advisory publishers, a substantial portion of whom also give personal advice. But it does show that the Act is a "generally applicable economic regulation[]" that does not single out the press for discriminatory treatment. *Minneapolis Star & Tribune Co.*, 460 U.S. at 581.[46] The relevant distinction is not between personal advisers and those who publish, but between advisers who are fit to practice the profession and those who, because of criminal misconduct, are not.

c. Petitioners also argue (Br. 37-38)[47] that the Act's regulation is excessive because disclosure of Lowe's criminal conduct would be a sufficiently effective method of regulation. In other areas of professional regulation, however, the government has not been limited to disclosure mechanisms to ensure the integrity of the profession. Surely a lawyer who misappropriated his client's funds has no constitutional right to continue engaging in the practice of law so long as he discloses his misdeeds. Indeed, in *Virginia State Board of Pharmacy* v. *Virginia Consumers Council, Inc.*, 425 U.S. 748 (1976), the Court

[46] The exclusion for bona fide newspapers of general circulation in Section 202(a)(11) of the Act renders it unnecessary for this Court to determine whether the Act's provisions may constitutionally be applied to ordinary newspapers that publish investment advice.

[47] See also ACLU Br. 18; AAP Br. 14-18.

struck down limitations on advertising because the asserted state interest—preserving professional standards—was more directly served by setting standards and revoking the licenses of persons guilty of professional dereliction (425 U.S. at 768-769). But such standards are precisely the regulatory tools petitioners would deny Congress and the Commission with respect to the investment advisory profession.

The regulatory framework envisioned by petitioners (Br. 39), in which dishonest persons would be allowed to continue to practice their profession so long as they disclosed their prior convictions, would not only be unprecedented but unworkable as well. There is no guarantee that the required disclosures would in fact be made. Indeed, Lowe's past violations of the Commission's disclosure rules (see page 4, *supra*) and of the clear prohibitions against misleading his clients and misappropriating their funds amply demonstrate that he may well continue to violate disclosure requirements if allowed to remain in the profession.[48] It is unrealistic to expect the Commission to be able to keep past wrongdoers under surveillance to ensure that they do not engage in future misconduct. *SEC* v. *Shapiro*, 494 F.2d 1301, 1309 (2d Cir. 1974); see also *Mitchell* v. *Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962); *SEC* v. *Culpepper*, 270 F.2d 241, 250 (2d Cir. 1959). This is particularly true where the dishonest individuals, such as Lowe, remain in a profession involving a fiduciary relationship that presents the opportunity to inflict serious harm on their clients. No matter how extensive the statutory disclosure requirements, there can be no adequate assurance that dishonest publishers will refrain from using their influence over investors for their personal gain and to their clients' ruin.

[48] Contrary to petitioners' contention (Br. 18; see also AAP Br. 11), the Commission is not required to prove that any of Lowe's published advice is fraudulent. The basis for professional regulation is the prevention of future harm to the public. Lowe's past frauds in connection with his advisory business demonstrate his unfitness and the likelihood that he will use his publications to resume his fraudulent practices.

d. Petitioners, joined by amici,[49] argue (Br. 18, 21) that the injunction authorized by the court of appeals to enforce the registration provisions of the Act would operate as an impermissible prior restraint. In *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973), however, this Court recognized that "it has never been held that all injunctions [against speech] are impermissible." The injunction forbidding practice of the profession by an unregistered adviser is simply the enforcement mechanism necessary to make the regulatory program effective. It is no different in any relevant respect from an injunction against the continuing practice of law without a license.

The injunction endorsed by the court of appeals would merely enjoin Lowe from rendering investment advice while not registered with the Commission.[50] As was the case in *Pittsburgh Press Co.*, "[t]he present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the court is asked to speculate as to the effect of publication." 413 U.S. at 390. In *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697 (1978), the Court upheld an injunction against publication of a canon of ethics in order to restrain unlawful trade practices. In *NLRB* v. *Gissell Packing Co.*, 395 U.S. 575, 616-620 (1969), the Court upheld an order directing an employer to cease and desist from making coercive statements to employees in viola-

[49] ACLU Br. 15-18; RCFP Br. 29-30; AAP Br. 10-14.

[50] As noted by the court of appeals (Pet. App. A20), Lowe would not be enjoined from publishing his views on general commercial or economic matters. Although some interpretive questions may arise with respect to whether certain comments relating to the securities markets constitute "investment advice," it is not unreasonable to require Lowe to take necessary measures to avoid engaging in prohibited activity. See, *e.g.*, *NLRB* v. *Gissell Packing Co.*, 395 U.S. 575, 617, 620 (1969). Indeed, because the court of appeals ordered that Lowe be enjoined only from giving advice with respect to specific securities (Pet. App. A20), he should have no difficulty in determining what sort of conduct is prohibited by the injunction.

tion of Section 8(c) of the National Labor Relations Act. These precedents fully support an injunction against Lowe's publication of unregistered investment advice, as does the Court's approval of an injunction against secondary picketing in *Giboney* v. *Empire Storage Co.*, 336 U.S. at 498, which "did no more than enjoin an offense against [state] law." Again, in *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 156 (1951), the Court noted that an injunction may be applied to a newspaper's publication policies to enforce the Sherman Act. So here. Since Congress has properly declared unlawful the rendering of investment advice by those not registered with the Commission, a court may properly enjoin such illegal activity.

C. Petitioners' Investment Advisory Publications Are Entitled To No More Than The First Amendment Protection Afforded Communications Characterized By The Court As Commercial Speech

Although it preferred to analyze this case as involving the regulation of professional or commercial activity, the court of appeals also concluded that regulation of investment advisory publications is proper under the commercial speech doctrine (Pet. App. A17). The two rationales, though in some respects independent, are closely related. Both involve the power of governments to regulate money-making activity. In *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, for example, the Court discussed the regulation of commercial speech in the context of the regulation of commercial activity generally, including activities carried out through speech (436 U.S. at 455-456). See pages 23-25, *supra*. The Court determined that prohibition of in-person solicitation by lawyers "falls within the State's proper sphere of economic and professional regulation" (436 U.S. at 459) not only because of the state's strong interest in protecting the public from professional abuses (*id.* at 460-468), but also because the lawyer's solicitation did not "involve[] political expression or an exercise of associational freedom" (*id.* at 458). Compare *In re Primus*, *supra*.

This rationale applies fully to Lowe's investment advisory publications. Lowe is not seeking to comment on cultural, philosophical, political or religious issues, or to associate with others. Rather, like the solicitation in *Ohralik*, the labor picketing in *NLRB* v. *Retail Store Employees Union*, *supra*, and the corporate proxy statements in *Mills* v. *Electric Auto-Lite*, *supra*, Lowe's speech relates only to private commercial or economic decisionmaking—the advisability of purchasing or selling securities. Moreover, Lowe seeks only to ply his investment advisory trade—to sell his professional advisory services to particular persons who are willing to pay for it. That trade may, as we have demonstrated (see pages 22-39, *supra*), be regulated to protect the public notwithstanding an effect on speech.

1. Communications such as Lowe's, made in the course of regulated commercial activities and not evincing a political or other noncommercial content, should receive no more than the First Amendment protection afforded commercial speech. Lowe's publications share many important characteristics with communications that the Court has recently categorized as commercial speech. We recognize that his advisory publications do not in all respects meet the more narrow definitions that the Court has sometimes used in referring to commercial speech. Nonetheless, we submit that, at least in the special context of the professions, these sorts of communications, intended to influence private economic decisionmaking, may appropriately be considered a variety of commercial speech and regulated accordingly.[51]

The reasons this Court has afforded diminished First Amendment protection to commercial speech apply equally to Lowe's publication of investment advice. Unlike speech of a "cultural, philosophical or political" nature, which is afforded full First Amendment protection because of its

[51] This comports with the flexible approach taken by the Court in *Bolger* v. *Youngs Drug Products Corp.*, No. 81-1590 (June 24, 1983), slip op. 6 (classifying as commercial speech informational pamphlets that the Court found could not "be characterized merely as proposals to engage in commercial transactions").

essential role in effective self-government,[52] commercial speech derives its constitutional value solely because of the role it performs in our free enterprise economy where "the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed." *Virginia State Board of Pharmacy*, 425 U.S. at 765. "[C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensible role in the allocation of resources in a free enterprise system." *Bates* v. *State Bar*, 433 U.S. 350, 364 (1977).

Investment advisory publications serve the same societal purpose as the communications at issue in this Court's commercial speech cases. Rather than providing a forum for philosophical, religious or political discussion, or even for discussion of a general commercial or economic nature (see *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 231 (1977)), they seek to advise clients on the relative merits of various investments and as such merely recommend commercial transactions. The purpose of investment advice such as that at issue here "is strictly business" (*Friedman* v. *Rogers*, 440 U.S. at 11), and the primary and immediate goal of the advisory publications is to "inform private economic decisions" (*Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980)). In short, the advisory letters do no more than tell the reader how to spend his money.[53]

The right to comment on cultural, philosophical, political, and religious issues plays a central role in our system of government and thus has been afforded maximum

[52] *Bates* v. *State Bar*, 433 U.S. 350, 363 (1977); see, *e.g.*, A. Meiklejohn, *Political Freedom* 79 (1960).

[53] Petitioners' publications therefore differ significantly from the types of speech at issue in *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978) (lobbying on tax legislation), and *Thornhill* v. *Alabama*, 310 U.S. 88 (1940) (peaceful labor picketing for a legitimate purpose), relied upon by petitioners (Br. 19, 22).

protection under the First Amendment. But, as this Court noted in *Ohralik*, 436 U.S. at 456:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values * * *.[54]

Affording Lowe's publications full protection would result in a devitalization of the First Amendment by eliminating the distinction the Court has carefully preserved between speech relating only to commercial activity and political or ideological speech. Accordingly, Lowe's advisory publications should be entitled to less First Amendment protection than other constitutionally safeguarded forms of expression. *Bolger* v. *Youngs Drug Products Corp.*, No. 81-1590 (June 24, 1983), slip op. 4-5; *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 562-563 (1980); *Virginia State Board of Pharmacy*, 425 U.S. at 771-772 n.24.

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[54] Petitioners argue (Br. 32-34; see also RCFP Br. 15; AFL-CIO Br. 8-9) that commercial speech is afforded limited First Amendment protection because it is unlikely that advertising is susceptible to being crushed by overbroad regulation and because the advertiser can more readily determine the truth of what is said. See, *e.g.*, *Virginia State Board of Pharmacy*, 425 U.S. at 771-772 n.24; *Bates*, 433 U.S. at 381. But neither point provides a reason for determining that petitioners' publications do not constitute commercial speech. The plethora of investment advisory publications currently being published (see page 36, *supra*) suggests that the medium is sufficiently hardy to withstand the modest registration provisions of the Act. Moreover, the actual truth of Lowe's statements is not at issue. Rather, it is his fitness to practice the profession. In any event, the cited cases deal with one type of commercial speech—product or service advertising. Product knowledge and economic incentive are not the only reason why commercial speech can be regulated. The more important reason is its subordinate position and the fear of devitalization of the First Amendment. These concerns clearly apply to investment advice as well as to advertising.

Petitioners argue (Br. 36) that investment newsletters do not significantly differ from comments on particular products and services in such publications as *Consumer Reports* and *Motor Trends*.[55] This argument, however, ignores the professional context in which investment advice is given and the overriding government interest in regulating that profession.[56] The Court has recognized that com-

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[55] See also ACLU Br. 13; AAP Br. 9. Amicus ACLU argues (Br. 13) that, just as this Court did not treat *Consumer Reports* as commercial speech in *Bose Corp.* v. *Consumers Union*, No. 82-1246 (Apr. 30, 1984), petitioners' publications likewise should not be considered commercial speech. Reliance on *Bose Corp.* is misplaced. *Bose Corp.* addressed only the proper standard of appellate review of an "actual malice" determination where the libel rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), was applied. The Court assumed without deciding that the *New York Times* rule applied for the purposes of deciding the narrow issue before it (see *Bose Corp.*, slip op. 26). The Court noted, however, that the rule "may seem out of place in a case involving a dispute about the sound quality of a loudspeaker." *Id.* at 28; see also *id.* at 1 (Rehnquist, J., dissenting) ("It is ironic in the first place that a constitutional principal which originated * * * because of the need for freedom to criticize the conduct of public officials is applied here to a magazine's false statements about a commercial loudspeaker system"). Thus, the Court did not decide in *Bose Corp.* the proper level of First Amendment protection for *Consumer Reports*.

[56] Thus, even if ordinary consumer-product reports, like investment advisory publications, were commercial speech, they could not constitutionally be subject to regulation similar to that imposed by Congress in the Investment Advisers Act. As this Court has stated, "[t]he [regulatory] interference with speech must be in proportion to the [government] interest served." *In re R.M.J.*, 455 U.S. 191, 203 (1982). The government's interest in the exchange of information about ordinary consumer products and services does not rise to the level of its interest in regulating the exchange of information about securities. Because the intangible nature of securities necessitates greater reliance by investors on the representations of others in judging their value, the trustworthiness of persons recommending the purchase of securities is critical. A further reason why any governmental interest in regulating publishers of ordinary consumer reports differs significantly from the government's interest in regulating advisory publishers is that the investment adviser has a fiduciary relationship

munications made by heavily regulated businesses in the context of commercial transactions are "of less constitutional moment than other forms of speech." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 563 n.5 (1980). This is all the more true where regulation of the professions is involved. See *Friedman* v. *Rogers*, *supra*; *Ohralik* v. *Ohio State Bar Ass'n*, *supra*. Petitioners' "speech," made solely in the context of their conduct within a licensed profession, is surely deserving of no more protection than is commercial speech generally. Otherwise, the power of the government to set professional standards and license admission to the professions could well be subject to First Amendment invalidation.

2. Because professional investment advice should receive no greater protection than is accorded commercial speech generally, the Court should look to its commercial speech cases to determine the highest appropriate level of First Amendment protection in this case. "The Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Bolger* v. *Youngs Drug Products Corp.*, slip op. 4-5. See *Central Hudson Gas & Electric Corp.*, 447 U.S. at 562-563; *Virginia State Board of Pharmacy*, 425 U.S. at 771-772 n.24. The Court's decisions have recognized a "common sense distinction" between commercial speech, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Bolger*, slip op. 4; *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 455-456. Thus, regulation that would not be permissible if applied to fully protected speech may well be proper with respect to commercial speech. For example, the Court has stated on a number of occasions that the

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with his clients. Moreover, even apart from the potential harm to an adviser's own clients, Congress was properly concerned with advisory publications because they "occur in such volume as substantially to affect interstate commerce, national securities exchanges and other securities markets, the national banking system and the national economy." Section 201 of the Act, 15 U.S.C. 80b-1.

presumption against prior restraints may not apply to commercial speech. *Central Hudson*, 447 U.S. at 571 n.13; *Friedman* v. *Rogers*, 440 U.S. at 10; *Virginia State Board of Pharmacy*, 425 U.S. at 771-772 n.24.

Moreover, the Court has recently indicated that "content-based restrictions," which are upheld only in the most "extraordinary circumstances" with respect to noncommercial speech, are "less problematic" when applied to commercial speech. *Bolger*, slip op. 5. See *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 512 (1981); *Friedman* v. *Rogers*, 440 U.S. at 11-16; *Ohralik*, 436 U.S. at 455-456. In fact, whenever this Court has applied a less strict analysis to commercial speech than it would with respect to noncommercial speech, it has engaged in precisely the sort of content-based analysis to which petitioners object (Br. 24-25). Thus, for example, this Court has upheld a prohibition against in-person solicitation of clients by lawyers when engaged in for commercial purposes but protected that activity when engaged in for political or social reasons. Compare *Ohralik* with *In re Primus*, 436 U.S. 412 (1978) (decided the same day). Similarly, the Court afforded less protection to a utility's promotional advertising than to a utility's comments on issues of public interest. Compare *Central Hudson* with *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530 (1980) (decided the same day). See also *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385-386 (1973). Thus, "'[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.'" *Bolger*, slip op. 8, quoting *Central Hudson*, 447 U.S. at 563.

Government regulation of commercial speech will be upheld so long as it is not more extensive than is necessary to achieve a substantial government interest. *Bolger*, slip op. 9; *Central Hudson*, 447 U.S. at 566. As we have demonstrated (see pages 27-39, *supra*), the ability to bar persons lacking in integrity in financial matters from

engaging in the investment advisory profession is essential to the regulation of that profession.

Petitioners challenge the court of appeals' conclusion that their publications may be enjoined because they are potentially misleading, urging (Br. 37-38) that the government cannot bar speech unless it is found to be actually misleading. By extending limited First Amendment protection to commercial speech, however, this Court has stated that it did not intend to "prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely." *Virginia State Board of Pharmacy*, 425 U.S. at 772. If the government is deprived of the ability to bar certain types of commercial speech that have a potential for abuse, and must instead demonstrate actual deception in each case, Congress's power to enact prophylactic measures to protect the public from misleading speech would be "substantially diminished." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 466; see also *United States* v. *Readers Digest Ass'n*, 662 F.2d 955 (3d Cir. 1981), cert. denied, 455 U.S. 908 (1982).

In *Central Hudson*, the Court emphasized that the test is not whether the speech in question is in fact misleading; it is sufficient that the speech lends itself to such abuse. This is made clear both by the language of *Central Hudson* and by the prior decisions relied on in that case. Thus, the Court stated that "[t]he government may ban forms of communication more *likely* to deceive the public than to inform it." 447 U.S. at 563 (emphasis supplied), citing *Friedman* v. *Rogers*, 440 U.S. at 13, 15-16; *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 464-465; *In re R.M.J.*, 455 U.S. 191, 203 (1982). In *Ohralik* the Court ruled that "[t]he State's perception of the *potential* for harm" justifies banning speech "inherently *conducive* to overreaching and other forms of misconduct." 436 U.S. at 464 (emphasis supplied). The regulation of speech at issue in *Ohralik* prohibited in-person client solicitations by lawyers. The Court dismissed the argument that the state must prove that the lawyer in fact took advantage of his clients, holding that

a state may adopt "prophylactic measures whose objective is the prevention of harm before it occurs." *Ibid.*

Similarly, in *Friedman* v. *Rogers*, *supra*, this Court approved a total ban by Texas on optometrists' use of trade names on the ground that their use was conducive to deception and manipulation, thus leading to a "significant *possibility* that trade names will be used to mislead the public." 440 U.S. at 12-13 (emphasis supplied). The Court found it irrelevant that the use of a trade name was "not in fact misleading," since it was a type of speech "which enhances the opportunity for misleading practices." *Id.* at 15.

The Court in *Friedman* upheld the ban on the use of trade names in part because of its reluctance to second-guess the legislature on the need to ban certain potentially misleading speech (440 U.S. at 13):

> The concerns of the Texas Legislature about the deceptive and misleading uses of optometrical trade names were not speculative or hypothetical, but were based on experience in Texas with which the legislature was familiar when * * * it enacted [the ban].

Similarly, there was nothing "speculative" or "hypothetical" about Congress's conclusion that persons guilty of past financial dishonesty are more likely to commit future violations which could lead investors to financial ruin. The Act's regulation of publishers was a result of Congress's concern with "the dangerous potentialities of stock market tipsters imposing upon unsophisticated investors." Senate Report at 21. Further, Congress was aware in 1960 that "increasing opportunities exist for unscrupulous persons to practice as advisers" (see pages 20-21, *supra*), a situation which led to it to strengthen the Commission's authority to deny or revoke the registration of persons guilty of past misconduct. Thus, as was the case in *Friedman*, the record before Congress demonstrating the need for regulating the publication of investment advice by unscrupulous persons was "substantial and well demonstrated." 440 U.S. at 15.

Finally, no constitutional basis exists to support the argument that Congress is limited to imposing disclosure

requirements in regulating the profession. While it is true that "some limited supplementation, by way of warning or disclaimer or the like, might be required * * *" of even truthful speech "to assure that the consumer is not misled" (*Bates*, 433 U.S. at 383-384), this Court in *Friedman* v. *Rogers* emphatically stated that "there is no First Amendment * * * rule" requiring the government to rely upon "publication of additional information [to] clarify or offset the effects" of the potentially misleading speech involved in that case (440 U.S. at 12 n.11). To the contrary, "when experience has prove[n] that [commercial speech] in fact * * * is subject to abuse," this Court has ruled that it may be "prohibited entirely." *In re R.M.J.*, 455 U.S. at 203. As we have demonstrated (pages 36-37, *supra*), disclosure requirements would be wholly inadequate to remedy the evil Congress sought to address in the Act. The Act's registration provisions are no more extensive than necessary to achieve a substantial government interest and therefore must be upheld under the First Amendment.

II. THE STATUTORY EXCLUSION FOR BONA FIDE NEWSPAPERS, MAGAZINES AND FINANCIAL PUBLICATIONS OF GENERAL CIRCULATION DOES NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT

The court of appeals correctly rejected petitioners' argument (Br. 39-45), not raised by any amicus, that the Act violates Lowe's right to equal protection under the Fifth Amendment by reason of the exclusion from the definition of investment adviser in Section 202(a)(11)(D) of the Act, 15 U.S.C. 80b-2(a)(11)(D), of any "bona fide newspaper, news magazine or business or financial publication of general and regular circulation" (Pet. App. A15-A16 n.5).[57] As this Court has consistently held:

[57] Petitioners do not now claim to fall within the exclusion. We address Amicus ACLU's statutory argument at pages 17-18 note 17, *supra*.

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

City of New Orleans v. *Dukes*, 427 U.S. 297, 303 (1976). Accord, *e.g.*, *Hodel* v. *Indiana*, 452 U.S. 314, 331 (1981); *Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1981). Petitioners' argument that the Act's classification denies them equal protection is insubstantial.

The classifications in the Act do not trammel fundamental rights. Although First Amendment rights are implicated, petitioners' speech, arising out of Lowe's practice of the advisory profession, is plainly subject to government regulation. Compare *Police Dep't* v. *Mosley*, 408 U.S. 92, 99 (1972); *Williams* v. *Rhodes*, 393 U.S. 23 (1968). Accordingly, the challenged classification, like any other arising out of the regulation of professional activity, must be considered under the "rational basis" test. See *Friedman* v. *Rogers*, 440 U.S. at 17; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).

The governing rule is that "social and economic legislation is valid unless 'the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational.'" *Hodel* v. *Indiana*, 452 U.S. at 332, quoting *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82-84 (1978). This Court "has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn." *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 175 (1980). "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with

mathematical nicety or because in practice it results in some inequality.'" *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), quoting *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

The Act's exclusion for bona fide newspapers is fully consistent with and furthers the government's substantial interest in regulating the activities of investment advisory publishers. The exclusion applies to "those publications which do not deviate from customary newspaper activities to such an extent that there is a likelihood that the wrongdoing which the Act was designed to prevent has occurred." *SEC* v. *Wall Street Transcript Corp.*, 422 F.2d 1371, 1377 (2d Cir.), cert. denied, 398 U.S. 958 (1970). The Commission has interpreted the exception to apply only where, "based on the content, advertising material, readership and other relevant factors, a publication is not primarily a vehicle for distributing investment advice." Investment Advisers Act Rel. No. 563, 42 Fed. Reg. 2953 n.1 (1977). See *SEC* v. *Suter*, 732 F.2d 1294, 1297 (7th Cir. 1984). Publications designed primarily to provide investment advice are more likely to be used for fraudulent and abusive practices than those which are not.[58] A classification, such as that embodied in Section 202(a)(11), which is based on the presence of abuses the regulation seeks to eliminate, necessarily advances the government's interest and assures that the regulation will not be more extensive than necessary to serve the interest. While abuses may to some degree arise out of excluded publications, Congress may "address[] itself to the phase of the problem which seems most acute to the legislative mind. * * * The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson* v. *Lee Optical Co.*, 348 U.S. at 489.

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[58] The publisher of an ordinary newspaper lacks the same incentives and opportunities to engage in abusive securities practices that are present in the case of advisory publishers. Moreover, editorial control over financial writers provides protections not ordinarily present with respect to advisory publishers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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